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Koay Hean Seng v Kerajaan Malaysia

B HIGH COURT (PENANG) — CIVIL APPEAL NO 12A-59–12 OF 2015
LIM CHONG FONG JC
28 JULY 2016

C *Civil Procedure — Default judgment — Setting aside — Taxpayer against whom default judgment for unpaid tax was entered claimed he never received notice of assessment from Inland Revenue Department ('IRD') — IRD's failure to exhibit copy of notice of assessment in its affidavits lent credence to taxpayer's case and constituted arguable/triable doubt whether notice of assessment was indeed sent to him — Whether taxpayer shown arguable defence on the merits — Whether appellant (declared bankrupt) had to obtain prior sanction of Director-General of Insolvency to appeal against lower court's refusal to set aside default judgment — Bankruptcy Act 1967 s 38(1) — Whether appeal concerned same action upon which bankruptcy was secured*

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E *Civil Procedure — Service — Service of judgment in default — Whether O 62 r 6 of the Rules of Court 2012 ('the ROC') applied to service of judgments — Whether service of default judgment by ordinary post to defendant's last-known address bad as it did not comply with modes of service under O 62 r 6(1) of the ROC — Whether 30-day time period under O 42 r 13 of the ROC for defendant to apply to set aside judgment did not run until he became aware of judgment*

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G The instant appeal was against the sessions court's decision to refuse to set aside a judgment in default obtained by the Inland Revenue Department ('the respondent') against the appellant. The judgment was for RM245,847.36 being personal income tax the appellant had allegedly not paid for the year of assessment 2008. After serving the summons and statement of claim for the said amount against the appellant by way of substituted service, the respondent entered the judgment in default of appearance on 23 October 2013. On 12 January 2015, the respondent commenced bankruptcy proceedings against the appellant based on the judgment. The appellant was adjudged a bankrupt on 26 February 2016. His application to set aside the default judgment was made on 7 September 2015. The respondent contended that the application should be dismissed because: (a) it was filed about 18 months outside the 30-day time limit prescribed under O 42 r 13 of the Rules of Court 2012 ('the ROC') as the default judgment was served on the appellant on 19 February 2014 by sending the same to his last-known address by way of ordinary post; and (b) the appellant had not obtained the prior sanction of the Director-General of Insolvency to file and maintain his instant appeal. The

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appellant argued that he was not served with the default judgment in accordance with the ROC and that he only became aware of the judgment after the bankruptcy proceedings were filed against him. As to the merits of his application, the appellant claimed he never received the notice for the year of assessment 2008 and that the tax computed therein was excessive.

Held, allowing the appeal with costs here and below and setting aside the default judgment:

(1) O 62 r 6 of the ROC applied to the service of court judgments. The default judgment that was sent to the respondent vide ordinary post did not comply with the modes of service prescribed by O 62 r 6(1). Since the default judgment had not been properly served, the time limited for the appellant to file the application to set aside the judgment became at large. The appellant had adequately explained his delay and he could not be faulted for having filed the application only after he became aware of the judgment from the bankruptcy proceedings filed by the respondent (see paras 20–21).

(2) The appellant had demonstrated that he had an arguable defence on the merits. The respondent claimed in its affidavit that the notice of assessment for the year of assessment 2008 dated 13 September 2012 was sent to the appellant by ordinary post to his last-known address. But the notice of assessment was not exhibited in any of its affidavits. This failure lent credence to the appellant's argument and at this juncture created an arguable or triable doubt as to whether the respondent had indeed caused the issuance of the aforesaid notice of assessment. This reservation was bolstered by the fact that the respondent allegedly issued the notice of assessment for the year of assessment 2008 only after four years in 2012. The respondent's obligation to cause the issuance of the notice of assessment was a mandatory one under s 96(1) of the Income Tax Act 1967 ('the Act') and was a condition precedent to its authority and power to collect and recover tax pursuant to ss 103(1) and 106(1) of the same, respectively (see paras 32, 35–36, 39).

(3) The appellant's defence of excessive tax computation was a 'non-starter' and was devoid of merit in view of s 106(3) of the Act. The appropriate relief was for the appellant to have appealed to the special commissioners of income tax against the computed tax but that was not done (see paras 26 & 28).

(4) The respondent's objection that the appellant, as a bankrupt, was not competent to file and maintain the instant appeal without having obtained the prior sanction of the Director-General of Insolvency under s 38(1) of the Bankruptcy Act 1967 was overruled because the appeal was plainly one that was in respect of the action upon which the bankruptcy was secured (see paras 10–11 & 14).

[Bahasa Malaysia summary

Rayuan ini adalah terhadap keputusan mahkamah sesyen untuk menolak untuk mengetepikan penghakiman ingkar yang diperoleh oleh Jabatan Hasil Dalam Negeri ('responden') terhadap perayu. Penghakiman tersebut adalah untuk RM245,847.36 iaitu cukai pendapatan peribadi perayu yang didakwa tidak dibayar untuk tahun taksiran 2008. Selepas menyerahkan saman dan pernyataan tuntutan untuk jumlah tersebut terhadap perayu melalui penyampaian ganti, responden memasukkan penghakiman ingkar kehadiran pada 23 Oktober 2013. Pada 12 Januari 2015, responden memulakan prosiding kebankrapan terhadap perayu berdasarkan penghakiman tersebut. Perayu telah diisytiharkan bankrap pada 26 Februari 2016. Permohonannya untuk mengetepikan penghakiman ingkar dibuat pada 7 September 2015. Responden berhujah bahawa permohonan tersebut sepatutnya ditolak kerana: (a) permohonan tersebut difailkan kira-kira 18 bulan di luar had masa 30 hari yang ditetapkan di bawah A 42 k 13 Kaedah-Kaedah Mahkamah 2012 ('KKM') memandangkan penghakiman ingkar diserahkan kepada perayu pada 19 Februari 2014 dengan menghantar penghakiman tersebut ke alamat terakhir yang diketahui melalui pos biasa; dan (b) perayu tidak mendapat kebenaran terlebih dahulu daripada Ketua Pengarah Insolvensi untuk memfailkan dan mengekalkan rayuannya ini. Perayu berhujah bahawa dia tidak diserahkan dengan penghakiman ingkar itu menurut KKM dan dia hanya menyedari penghakiman selepas prosiding kebankrapan telah difailkan terhadapnya. Berhubung merit permohonannya, perayu mendakwa dia tidak pernah menerima notis untuk tahun taksiran 2008 dan pengiraan cukai di dalamnya adalah berlebihan.

Diputuskan, membenarkan rayuan dengan kos di mahkamah ini dan mahkamah sesyen dan mengetepikan penghakiman ingkar:

(1) A 62 k 6 KKM terpakai untuk penyerahan penghakiman mahkamah. Penghakiman ingkar yang telah dihantar kepada responden melalui pos biasa tidak mematuhi mod perkhidmatan yang ditetapkan oleh A 62 k 6(1). Memandangkan penghakiman ingkar tidak diserahkan dengan wajar, masa yang dihadkan untuk perayu memfailkan permohonan untuk mengetepikan penghakiman telah terbuka. Perayu dengan memadai menjelaskan kelewatannya dan dia tidak boleh disalahkan kerana memfailkan permohonan hanya setelah dia menyedari akan penghakiman daripada prosiding kebankrapan yang difailkan oleh responden (lihat perenggan 20–21).

(2) Perayu telah menunjukkan bahawa dia mempunyai pembelaan yang boleh dipertikaikan berdasarkan merit. Responden mendakwa dalam afidavitnya bahawa notis taksiran untuk tahun taksiran 2008 bertarikh 13 September 2012 telah dihantar kepada perayu melalui pos biasa ke alamat terakhir yang diketahui. Tetapi notis taksiran tidak dipamerkan

dalam mana-mana afidavitnya. Kegagalan ini memberikan beban kepada hujah perayu dan pada ketika ini mewujudkan keraguan yang boleh dipertikaikan atau yang boleh dibicarakan sama ada responden memang mengeluarkan notis taksiran yang disebut di atas. Persoalan ini disokong oleh fakta bahawa responden didakwa mengeluarkan notis taksiran untuk tahun taksiran 2008 hanya selepas empat tahun pada 2012. Kewajipan responden untuk mengeluarkan notis taksiran adalah wajib di bawah s 96(1) Akta Cukai Pendapatan 1967 ('Akta') dan merupakan syarat terdahulu kepada pihak berkuasa dan kuasa untuk mengumpul dan mendapatkan semula cukai menurut ss 103(1) dan 106(1) Akta yang sama, secara berasingan (lihat perenggan 32, 35–36 & 38).

(3) Pembelaan perayu berhubung pengiraan cukai yang berlebihan adalah 'non-starter' dan tidak mempunyai merit menurut s 106(3) Akta. Pelepasan yang sesuai adalah untuk perayu merayu kepada pesuruhjaya khas pendapatan cukai terhadap cukai yang dikira tetapi perkara itu tidak dilakukan (lihat perenggan 26 & 28).

(4) Bantahan responden bahawa perayu, sebagai seorang bankrap, adalah tidak kompeten untuk memfailkan dan mengekalkan rayuan ini tanpa mendapat kebenaran terlebih dahulu daripada Ketua Pengarah Insolvensi di bawah s 38(1) Akta Kebankrapan 1967 dibatalkan kerana rayuan adalah berkaitan dengan tindakan di mana kebankrapan tersebut diperoleh (lihat perenggan 10–11 & 14).]

Cases referred to

Bank Bumiputra Malaysia Bhd v Majlis Amanah Ra'ayat [1979] 1 MLJ 23, FC (refd)

Bathamani a/p Suppiah v Southern Finance Co Bhd [2000] 6 MLJ 427, HC (refd)

Cheong Yook Onn v Hong Leong Islamic Bank Bhd [2011] 1 LNS 1798, CA (refd)

Chin Kon Nam & Anor v Chai Yun Phin Development Sdn Bhd [1996] 4 MLJ 271, HC (refd)

Government of Malaysia v Sim Soe Hoe [1990] 1 MLJ 379; [1990] 2 CLJ Rep 72, HC (refd)

Hasil Bumi Perumahan Sdn Bhd & Ors v United Malayan Banking Corp Bhd [1994] 1 MLJ 312; [1994] 1 CLJ 328, SC (refd)

Ho Ken Seng v Progressive Insurance Sdn Bhd [2013] 2 MLJ 335, FC (refd)

Integrated Credit & Leasing Sdn Bhd v Kerajaan Malaysia [2008] MLJU 576, HC (refd)

John Tugang Jeli v Government of Malaysia [2015] 11 MLJ 283, HC (refd)

Kerajaan Malaysia v Abdul Rahim bin Baki [1994] 4 BLJ 376 (refd)

Kerajaan Malaysia v Beyond Gateway Sdn Bhd [2003] MLJU 178; [2003] 2 CLJ 527, HC (refd)

Kerajaan Malaysia v Central Strata Sdn Bhd [2013] 5 MLJ 728, HC (refd)

Kerajaan Malaysia v Pangkal Permata (M) Sdn Bhd [2013] 4 MLJ 937, HC (refd)
Kerajaan Malaysia v Syarikat Muliajaya Sdn Bhd [2010] MLJU 647, HC (refd)
Logan Ravishankar v My IT Asia Sdn Bhd [2015] MLJU 905; [2015] AMEJ 1078, HC (refd)
Sabah Bank Bhd v Syarikat Bintang Tengah Sdn Bhd & Ors [1992] 2 MLJ 588, HC (refd)
Supreme Finance (M) Bhd v Mohamad Noor (t/a Everway Food Centre) & Ors [1993] 2 MLJ 29, HC (refd)
Yogananthy a/p A S Thambaiya v Idris bin Osman [1996] MLJU 240, HC (refd)

Legislation referred to

Bankruptcy Act 1967 s 38(1)
Income Tax Act 1967 ss 96(1), 99(1), 103(1), 106(1), (3), 142(1)
Rules of Court 2012 O 42 r 13, O 55 r 5, O 62 rr 6, 6(1), (1)(a), (1)(b)

Desmond Lee Kheng Hong (Allen & Assoc) for the appellant.
Shoba Rajah (Inland Revenue Board) for the respondent.

Lim Chong Fong JC:

INTRODUCTION

[1] This is an appeal brought by the appellant ('the taxpayer') against the decision of the Georgetown Sessions Court dated 29 December 2015 that disallowed the setting aside of the judgment in default dated 23 October 2013 obtained by the respondent ('the Inland Revenue Department').

[2] The cause papers for purposes of this appeal under O 55 r 5 of the Rules of Court 2012 comprised, inter alia, the following:

(a) the appellant's notice of application to set aside the default judgment dated 7 September 2015;

(b) the appellant's affidavit in support of Koay Hean Seng affirmed on 3 September 2015;

(c) the respondent's affidavit in reply of Hamisah bt Zakaria affirmed on 23 September 2015;

(d) the appellant's affidavit in reply of Koay Hean Seng affirmed on 1 October 2015;

(e) the respondent's affidavit in reply (2) of Hamisah bt Zakaria affirmed on 19 October 2015; and

(f) the appellant's affidavit in reply (2) of Koay Hean Seng affirmed on 21 October 2015.

[3] After having read the written submissions filed by the parties, I heard counsel on 4 July 2016 and thereafter deferred my decision to deliberate on the arguments presented by them.

[4] I now give my decision together with my supporting grounds thereto.

SALIENT BACKGROUND FACTS

[5] The respondent commenced Georgetown Sessions Court Suit No B5–3–06–2013 on 26 June 2013 against the appellant for failure to pay income tax for the year of assessment 2008 amounting to RM245,847.36.

[6] The writ of summons and statement of claim were served on the appellant vide substituted service pursuant to the order of court dated 19 September 2013.

[7] As the result of the appellant's failure to enter his appearance, the respondent entered judgment in default of appearance on 23 October 2013.

[8] The respondent thereafter on 12 January 2015 commenced bankruptcy proceedings against the appellant based on the aforesaid judgment in default. The appellant was subsequently adjudged a bankrupt on 26 February 2016 after the appellant's application to stay the hearing of the creditor's petition pending the disposal of his application to set aside the default judgment as well as the setting aside of the creditor's petition were refused.

[9] The appellant in the meantime on 7 September 2015 applied to the set aside the aforesaid judgment in default but the sessions court on 29 December 2015 dismissed the appellant's application, hence this appeal.

CONTENTIONS AND FINDINGS

[10] At the outset of this appeal, the respondent raised two preliminary objections, to wit:

(a) the appellant is not competent to file and maintain this appeal without the sanction of the Director General of Insolvency; and

(b) the appellant's application to set aside the judgment in default was bad *in limine* because it was not filed within the time prescribed by O 42 r 13 of the Rules of Court 2012.

[11] It is not disputed that this appeal has been brought without the prior sanction of the Director General of Insolvency. As to the requirement of the sanction, the respondent referred to s 38(1) of the Bankruptcy Act 1967 which reads:

> Where a bankrupt has not obtained his discharge —
>
> (a) the bankrupt shall be incompetent to maintain any action (other than an action for damages in respect of an injury to his person) without the previous sanction of the Director General of Insolvency.

[12] In this regard, the respondent referred to the High Court cases of *Sabah Bank Bhd v Syarikat Bintang Tengah Sdn Bhd & Ors* [1992] 2 MLJ 588, *Supreme Finance (M) Bhd v Mohamad Noor (t/a Everway Food Centre) & Ors* [1993] 2 MLJ 29, *Chin Kon Nam & Anor v Chai Yun Phin Development Sdn Bhd* [1996] 4 MLJ 271 and *Bathamani a/p Suppiah v Southern Finance Co Bhd* [2000] 6 MLJ 427 to illustrate the application of s 38(1) of the Bankruptcy Act 1967.

[13] However in the Federal Court case of *Ho Ken Seng v Progressive Insurance Sdn Bhd* [2013] 2 MLJ 335, Richard Malanjum CJ (Sabah and Sarawak) held:

> [27] In addition, in our view s 38(1)(a) should not be given too extensive an interpretation.
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> [28] *While we agree that the word 'action' therein should refer to civil action or civil proceeding in court* (see: *Re Chua Tin Hong Ex parte Castrol (M) Sdn Bhd* [1996] MLJU 608; [1997] 3 CLJ Supp 174), *it should be restricted to a new and separate action and not the same upon which the bankruptcy was secured. And we would think that the scope of section 38(1)(a), other than the saving clause therein, should be limited to a new chose in action that could affect the assets or proprietary rights of a bankrupt intended for distribution to his creditors.* (See: *Boaler v Power and Ors* [1910] 2 KB 229).
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> [29] As such, s 38(1)(a) of the Act is not relevant when a bankrupt, an aggrieved person, invokes s 92(2) of the same Act. To that extent we agree with the decision in *Re Khoo Kim Hock* and the minority judgment of the Court of Appeal in this case.
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> [30] It would be most unfair and unconscionable if a person is being disabled and incapacitated, unless he obtains sanction from the DGI, to challenge the very action that caused the disability and incapacitation. It would tantamount to denying him his right of access to justice and probably his constitutional right of appeal. (Emphasis added.)

[14] This appeal here is plainly one that is in respect of the action upon which the bankruptcy was secured. Hence I overrule this preliminary objection.

[15] As to the other on the time limited for filing the application to set aside the judgment in default, O 42 r 13 provides as follows:

> 13 Setting aside or varying judgment and orders
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> Save as otherwise provided in these Rules, where provisions are made in these Rules for the setting aside or varying of any order or judgment, a party intending to set aside or to vary such order or judgment shall make an application to the Court and serve it on the party who has obtained the order or judgment within thirty days after the receipt of the order or judgment by him.

[16] The respondent's contention is that the appellant's application to set aside the aforesaid judgment in default was filed on 7 September 2015 which is long beyond the one month period prescribed by the Rules of Court 2012. In this regard, the respondent claimed that the judgment in default was served on the appellant on 19 February 2014 and the appellant was late by about 1 1/2 years.

[17] The respondent relied on the court of appeal case of *Cheong Yook Onn v Hong Leong Islamic Bank Bhd* [2011] 1 LNS 1798 wherein Clement Skinner JCA held as follows:

> [3] The learned judge was vested with a discretion whether or not to set aside the judgment in default of defence. She refused to do so on two grounds, namely, that the appellant had not given a credible explanation for his delay in applying and there was no defence of merits to the respondent's claim (see p 91 record of appeal). It has not been demonstrated to us that the learned judge had wrongly exercised her discretion ... In this case, since the appellant had filed his setting aside application well outside the 30 days period after the judgment in default was served on him, he had an additional burden of explaining why he did not comply with O 42 r 13 of the RHC.

[18] In this appeal, the appellant has explained that he only became aware of the judgment in default after the respondent filed the bankruptcy proceedings against him by reason that the aforesaid judgment in default was not properly served upon him earlier in accordance with the Rules of Court 2012. In this respect, the respondent sent the judgment in default to the appellant by ordinary post to his last known address which is also the same address as that deposed in the appellant's affidavits in support and reply. Order 62 r 6 of the Rules of Court 2012 provides:

> 6 Ordinary service: How effected
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> (1) The service of any document, not being a document which in accordance with these Rules is required to be served personally, may be effected —
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> (a) by leaving the document at the proper address of the person to be served;

(b) by prepaid registered post;

(c) by facsimile in accordance with paragraph (3);

(d) in such other manner as may be agreed between the party serving and the party to be served; or

(e) in such other manner as the Court may direct.

[19] In *Yogananthy a/p A S Thambaiya v Idris bin Osman* [1996] MLJU 240, Abdul Malik Ishak J (later JCA) held as follows:

> Order 62 r 6 (1) of the RHC contains provisions as to when ordinary service may be effected and it is worded thus:
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> > Service of any document, not being a document which by virtue of any provision of these rules is required to be served personally, may be effected —
> >
> > (a) by leaving the document at the proper address of the person to be served; or
> >
> > (b) by prepaid registered post; or
> >
> > (c) in such other manner as the court may direct.
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> This rule does not relate to documents which are required to be served personally. There is a certain degree of formality for service of any document under this rule. The words 'any document' must include affidavits like encls 18 and 19. Order 62 r 6(2) of the RHC contains provisions as to what is the proper address of any person on whom a document is to be served. Order 62 r 6(3) of the RHC makes it clear that nothing in the rule is to prohibit the personal service of any document or affect any written law which provides for the manner in which documents may be served on a body corporate. *In my judgment, O 62 r 6 of the RHC has to be read as a whole and that although O 62 r 6 of the RHC uses the word 'may', the rule specifies the method of ordinary service which can be used; the effect of the rule being that either service has to be in accordance with one of the three methods specified in O 62 r 6 of the RHC or by way of personal service as set out in O 62 r 6 of the RHC or in accordance with a statute* and I wholly agree with His Lordship. (Emphasis added.)

[20] In my view, O 62 r 6 applies to the service of court judgment too. The judgment in default that was sent by the respondent vide ordinary post did not therefore comply with the modes of service prescribed by O 62 r 6(1). In this regard, I am unable to accept the contention of the respondent that postage by ordinary post is equivalent to leaving the document at the proper address of the person served. To me, the provision in O 62 r 6(1)(a) meant an officer of the respondent personally leaving the judgment in default at the last known address of the appellant. Otherwise it would make mockery of the provision in O 62 r 6(1)(b).

[21] In the circumstances and since the judgment in default had not been

properly served upon the appellant, the time limited for the filing of an application to set aside the default judgment became at large. The appellant could not therefore be faulted for having only filed the application on 23 October 2015 after the appellant became aware of it due to the bankruptcy proceedings brought by the respondent. Consequently, I am satisfied that the appellant has adequately explained his delay and I overrule this preliminary objection too.

[22] As to the substantive merits of the appeal, it is not disputed that the judgment in default has been regularly obtained. As such it is then incumbent upon the appellant to satisfy me that there are merits in the appellant's defence to justify the aforesaid judgment in default to be set aside, see *Bank Bumiputra Malaysia Bhd v Majlis Amanah Ra'ayat* [1979] 1 MLJ 23.

[23] In the Supreme Court case of *Hasil Bumi Perumahan Sdn Bhd & Ors v United Malayan Banking Corp Bhd* [1994] 1 MLJ 312; [1994] 1 CLJ 328, Hj Mohd Jemuri bin Serjan CJ (Borneo) held as follows:

> In our view, in order to succeed in his application under these orders the applicant must show that he has a defence which have some merits and which the court should try. *To use common and plain language, the applicant must show that his defence is not a sham defence but one that is prima facie, raising serious issues as bona fide reasonable defence that ought to be tried because obviously if the defence is a sham defence there is no defence and the application must fail. It can hardly be emphasised that in order for the Court to arrive at a decision that the defence has merits it must perforce make a reasoned assessment of the justice of the case by forming a professional view of the probable outcome of the case, but this is stating the obvious. It involves a mental process that goes through the mind of a Judge when making a decision in any case, weighing the evidence of a litigant against that of another on the facts alleged by a party against those of the other before finally coming to a decision*. At any rate whether we follow *Saudi Eagle* or *Evans v Bartlam*, both cases only lay down, not rules of law, that must be stringently complied with but merely guidelines to assist a judge in the exercise of his discretion. So long as the judge exercises his discretion according to principles of law the appellate court would hesitate to interfere with the judge's exercise of discretion. It is for the appellants to convince us that this is a proper case for our interference with the learned judge's exercise of his discretion under O 19 r 9.
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> *Now it is true that in matters of discretion no one case can be authority for another (per Lord Wright in Evans v Bartlam) and in deciding this appeal we have to examine the facts as they appear on the pleadings and in the affidavits of the parties, but before we go into them in detail we also remind ourselves that where there is a conflict of evidence on affidavits it would not be proper for us to believe one side and disbelieve the other. Such conflict should be resolved at the trial as it is not our function to try to resolve conflicts of evidence on affidavits at this stage*. (Emphasis added.)

[24] I have further held as follows in *Logan Ravishankar v My IT Asia Sdn Bhd* [2015] MLJU 905; [2015] AMEJ 1078 with emphasis added:

A [36] Save that an affidavit of merits is required, the Rules of Court 2012 as well as the decided cases do not prescribe the form and contents of that affidavit for purposes of an application under O 13 r 8 or O 19 r 9 ...

B *[37] In the circumstances, I would venture the view that the threshold to set aside a default judgment is not equal but lower than that required to defend a summary judgment application although both share the synonymous expression 'triable' to surmount their respective thresholds. This is seen from the O14 case of Utama Merchant Bank Bhd (supra) relied upon by the Plaintiffs where a rebuttal affidavit of the defendant therein with supporting documentary evidence was inflexibly required to defend the application. This is understandably so as the defendant's defence would*
C *otherwise be construed as a bare denial; see the court of appeal case of Microsoft Corporation v Yong Wai Hong [2008] 3 MLJ 309. The setting aside a default judgment is however to overcome and revoke the expression of the court's coercive power where judgment has been obtained only by a failure to follow any of the rules of procedure as explained in Hasil Bumi Perumahan Sdn Bhd & Ors. It is on a different footing from*
D *that of a summary judgment application*. The plaintiffs herein are at liberty to file their application for summary judgment after the default judgment is set aside if they are convinced that this action need not await trial.

[38] Accordingly, the defendants are dutibound to convince me that the defence as pleaded in their draft statement of defence is not a sham defence ...

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[25] From the affidavits of merit filed by the appellant, that is to say the appellant's affidavit in support, appellant's affidavit in reply and appellant's affidavit in reply (2) of Koay Hean Seng, it is discerned that the appellant relied
F on two interrelated points in attempt to demonstrate that their defence is meritorious, to wit:

(a) the notice of assessment of the year of assessment 2008 was never received by them; and

G (b) the tax computation therein was excessive.

[26] I will deal with them in the reverse order. As to the tax computation point, ss 99(1) and 106(3) of the Income Tax Act 1967 provide as follows:

99 Right to appeal

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(1) A person aggrieved by an assessment made in respect of him may appeal to the Special Commissioners against the assessment by giving to the Director General within thirty days after the service of the notice of assessment or, in the case of an appeal against an assessment made under section 92, within the first three months of the year of assessment following the year of assessment for which the assessment
I was made (or within such extended period as regards those days or months as may be allowed under section 100) a written notice of appeal in the prescribed form stating the grounds of appeal and containing such other particulars as may be required by that form.

106 Recovery by suit

(3) In any proceedings under this section the court shall not entertain any plea that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased under subsection 103(1A), (3), (4) ,(5) ,(6),(7) or (8).

[27] In *Government of Malaysia v Sim Soe Hoe* [1990] 1 MLJ 379; [1990] 2 CLJ Rep 72, Chong Siew Fai J (later CJ (Sabah and Sarawak)) held as follows:

In normal case, where applications are made to set aside default but regular judgments, the rule, which has sometimes been described as 'an inflexible rule', is that there ought to be affidavits stating facts showing a defence on the merits. Or, at any rate, where the application is not thus supported, it ought not to be granted except for some very sufficient reason. *Farden v Ritcher* (1889) 23 QBD 124. And, to show a defence on the merits, a defendant need only disclose an arguable or triable issue.

In our instant case, the crucial question, however is: Having regard to the relevant provisions in the Income Tax Act 1967 (to which provisions I shall refer) and in view of the nature of the claims in this action, does that normal rule of showing defence on the merits apply?

...

Section 106(1) of the Act provides that tax due and payable may be recovered by the Government by civil proceedings as a debt due to the Government, and sub-s (3) of s 106 enacts, inter alia, that in any proceedings under the section the courts shall not entertain any plea that the amount of tax sought to be recovered is excessive or incorrectly assessed or increased under s 103(4) or (5A). (Emphasis added.)

Furthermore in *Kerajaan Malaysia v Abdul Rahim bin Baki* [1994] 4 BLJ 376, Abdul Aziz bin Mohamad J (later FCJ) held as follows:

The position of the defendant would merit serious consideration were this to be any other case but a claim under s 106(1) of the Income Tax Act 1967. But for a claim under s 106(1) there is s 106(3) which says:

> In any proceedings under this section the Court shall not entertain any plea that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased under s 103(4), (5) or (5A).

What it means is that in any civil proceedings to recover income tax allegedly due and payable, the c must close its ears and shut its eyes to any suggestion or indication that the amount claimed is excessive or incorrectly assessed. It has the effect of making the amount claimed conclusively correct and unchallengeable in the civil proceedings to recover it and, consequently, of making the judgment subsequently entered immune from subsequent challenge on the ground that the amount of judgment was excessive or incorrectly assessed ... (Emphasis added.)

Also in *Kerajaan Malaysia v Beyond Gateway Sdn Bhd* [2003] MLJU 178; [2003] 2 CLJ 527, Abdul Malik Ishak J (later JCA) held as follows:

> *Now, pursuant to s 103 of the Income Tax Act 1967, tax becomes due and payable upon service of the Notice of Assessment and the court is not the correct forum to entertain any plea by the defendant that the amount of tax is excessive, incorrectly assessed or under appeal*. I say and I so say that if a defendant is aggrieved by the assessment, the defendant may appeal to the Special Commissioners of Income Tax as provided for under s 99 of the Income Tax Act 1967(*Sun Man Tobacco Co Ltd v Government of Malaysia* [1973] 2 MLJ 163; [1973] 1 LNS 144, FC) ... (Emphasis added.)

[28] In the premises, it is crystal clear that the appellant's defence of excessive tax computation is a 'non-starter'. In other words, it is devoid of merit. The appropriate relief would be for the appellant to appeal to the special commissioners of income tax but that wasn't done.

[29] As to the non receipt of the tax assessment point, the appellant referred to ss 96(1) and 103(1) of the Income Tax Act 1967:

> 96 Notice of assessment
>
> (1) As soon as may be after an assessment, other than an assessment under subsections 90(1A), has been made, the Director General shall cause a notice of assessment to be served on the person in respect of whom the assessment was made.
>
> 103 Payment of tax
>
> (1) Subject to this section, tax payable under an assessment or a composite assessment shall on the service of the notice of assessment or composite assessment on the person assessed, other than a company to which section 103A applies, be due and payable at the place specified in the notice whether or not that person appeals against the assessment.

[30] In this appeal, the appellant strenuously contended that he never had sight of the notice of assessment for the year of assessment 2008. He deposed in the appellant's affidavit in reply (2) that:

> 5. Saya menafikan perenggan 6 dan 7 afidavit jawapan plaintif (2) dan saya setelah dinasihati oleh peguamcara saya dan sesungguhnya mempercayai serta menyatakan bahawa plaintif gagal membuktikan dengan bukti yang kukuh notis taksiran 2008 sungguhpun telah berulang kali diminta oleh saya sebelum dan semasa permohonan ini.
>
> 6. Saya menyatakan tanpa Notis taksiran 2008 dan bukti penyerahan yang kukuh ia adalah mustahil bagi saya untuk mencabar dan/atau membuat rayuan.

The respondent did not further reply to this affidavit of the appellant.

[31] From all the affidavits that were filed, it seems indisputable that the appellant knew of the estimated tax assessment for the year of assessment 2008 amounting to RM218,295.60 based on the tax statement issued to him by the

respondent and exhibited by the appellant as exh 'KHS A'. He disputed the estimated tax assessment but did nothing until 24 June 2013 when he submitted the *Borang* B 2008 of his self computation of tax of RM24,777.66 together with the cheque payment of RM24,777.66 to the respondent as exhibited in exhs 'KHS B' and 'KHS C' respectively.

[32] The respondent thereafter replied that the aforesaid *Borang* B 2008 submission was late and the notice of assessment for year of assessment 2008 dated 13 September 2012 was already sent to the appellant. This notice of assessment was not exhibited as an exhibit in any of the affidavits.

[33] The respondent cited several cases to me which illustrated that it isn't a meritorious defence simply to allege that the taxpayer did not received the notice of assessment. They were *Integrated Credit & Leasing Sdn Bhd v Kerajaan Malaysia* [2008] MLJU 576, *Kerajaan Malaysia v Syarikat Muliajaya Sdn Bhd* [2010] MLJU 647, *Kerajaan Malaysia v Pangkal Permata (M) Sdn Bhd* [2013] 4 MLJ 937, *Kerajaan Malaysia v Central Strata Sdn Bhd* [2013] 5 MLJ 728 and *John Tugang Jeli v Government of Malaysia* [2015] 11 MLJ 283. Save for one of them that was decided after trial, the rest were summary judgment cases. The rationale was explained by Varghese George JC (now JCA) in *Kerajaan Malaysia v Syarikat Muliajaya Sdn Bhd* as follows:

> Section 145(2) provides that a notice relating to tax which is sent by ordinary post shall be deemed to have been served on the day succeeding the day on which the notice would have been received in the ordinary course of post provided it is addressed in the case of a company to its registered office or to its last known address or to any person authorized by it to accept service of process. It must be pointed out that s 145 (the specific provision in the Income Tax Act 1967 on service of notices) does not anywhere spell out that a register or some record of notices sent out daily by ordinary post must be maintained as proof of posting. No such requirement is also stipulated in respect of notices sent out by registered post. Section 145(3) only covers a situation where a notice sent by registered post remains uncollected and in such event the need is expressed for the officer in charge of a post office to verify by a sworn affidavit that there has been tendered for delivery to the addressee a registered letter before the notice is deemed to have been served. What can be deduced in my assessment from a reading of the said section as whole is that it was the intent behind the provision that there should be flexibility in the procedural aspects of effecting service of the notices by LHDN on tax payers. That to me is also consistent with the larger object behind the legislation, the Income Tax Act 1967 and the concomitant obligation of all persons deriving chargeable income in the country to annually pay taxes. The social and fiscal objectives in raising taxes for the operations of the government and for development purposes in the country require me to give that provision a purposive and liberal interpretation in the circumstances. I also accept the contention of counsel for the plaintiff that apart from such a requirement being not part of the law, any reading into s 145 of such a requirement would be tantamount to imposing additional financial and manpower burden on the government. Needless to say this could translate into additional taxes

for all taxpayers, the majority of whom diligently meet their tax obligations on time.

[34] I have combed through those cases and discover that the notices of assessment were produced in all of them including the certificate signed by the Director of Inland Revenue pursuant to s 142(1) of the Income Tax Act 1967. The certificate was sufficient evidence of the amount due and sufficient authority for the court to give judgment for the amount claimed.

[35] To me, the crux of the appellant's contention here is twofold. Firstly, the respondent was duty-bound to cause the issuance of the notice of assessment for year of assessment 2008 and secondly, the appellant did not receive that notice of assessment. The second contention could not be sustained in line of the aforementioned case authorities particularly that in *Kerajaan Malaysia v Central Strata Sdn Bhd* where Lee Swee Seng JC (now J) held that it would be sufficient for an officer to affirm on oath that the notice of assessment had been sent out. I agree with His Lordship's views and it is plain here as averred in the respondent's affidavit in reply that the notice of assessment for the year of assessment dated 13 September 2012 has been sent out by ordinary post to the appellant's last known address.

[36] However, it is my view that what is crucially lacking here is the respondent's failure to exhibit the notice of assessment for the year of assessment 2008 dated 13 September 2012 anywhere in the respondent's affidavits. This failure lends credence to the appellant's argument and at this juncture creates an arguable or triable doubt as to whether the respondent has indeed caused the issuance of the aforesaid notice of assessment. My reservation is bolstered by the fact that the respondent allegedly issued the notice of assessment of year of assessment 2008 only after four years in 2012. The obligation of the respondent to cause the issuance of the notice of assessment is a mandatory one under s 96(1) of the Income Tax Act 1967 and is a condition precedent to the respondent's authority and power to collect and recover tax pursuant to ss 103(1) and 106(1) of the same respectively.

[37] I am nonetheless mindful of His Lordship Chong Siew Fai's aforequoted dicta in *Government of Malaysia v Sim Soe Hoe* which was also an application to set aside a default judgment but this appeal before me may be one that should be differentiated because of the abovementioned reason. I am satisfied that the applicant's argument herein does not prima facie appear to be a sham defence.

[38] The respondent has also impressed upon me to consider the plight of the government in having incurred wasted costs and time especially the bankruptcy proceedings that were pursued against the appellant if this appeal is allowed. Whilst I do empathise with the respondent, I am equally cognizant

of the plight of the appellant who has been unjustly made a bankrupt for the abovementioned reason. If the appeal is allowed, his bankruptcy would be annulled and consequently his personal record is cleansed: otherwise he would be a discharged bankrupt even if he settles his tax arrears. However, all is not lost for the respondent because the respondent can simply apply for summary judgment with the notice of assessment and certificate of the Director General of Insolvency exhibited after the sessions court suit is resuscitated. The appellant runs the risk of bankruptcy again if he does not pay up if and when summary judgment is obtained.

CONCLUSION

[39] For the foregoing reasons, I am satisfied that the appellant has at this juncture demonstrated that he has an arguable defence on the merits.

[40] Accordingly, I allow the appeal with costs herein and in the sessions court below to be in the cause of the sessions court suit. The judgment in default dated 23 October 2013 is hereby set aside.

Appeal allowed with costs here and below and default judgment set aside.

Reported by Ashok Kumar